positions as to what U.S. Constitution required for a standard of proof of falsity.

Chief Justice Phillips in the 2000 *Turner* decision wrote:

> [54] . . . Some courts, as would Justice Hecht's dissent, have held that public figures must prove both actual malice and falsity by clear and convincing evidence. . . .

Justice Owens joined Justice Hecht in the dissent.

Justice Hecht in 2002 wrote the opinion for the court in *Bentley v. Bunton*, he was joined by Justice Owens.

> [135] . . . We have not required proof of falsity to be by more than a preponderance of the evidence, . . .

Novel Solutions

When there is confusion as to what the law is, judges sometimes have to invent novel solutions. In this example by making the jury's duty more complicated and potentially confusing . Superior Court of the District of Columbia, Judge Arthur L. Burnett Sr. Took a novel approach when at trial a dispute arose over the burden of proof. *Ayala v. Washington*, 679 A.2d 1057, 1996.DC.0042146¶ 24, 44-46 (D.C. July 25, 1996) (VersusLaw)

> [24] . . . The trial judge thought that they were, and that a higher standard of clear and convincing evidence, rather than a preponderance of evidence, was required. Because the trial judge was uncertain, however, he solicited jury findings under both standards and devised a special interrogatory form that he believed would create a complete appellate record.

The jury had to find three facts: falsity, publication, and constitutional malice. The jury found constitutional malice by clear and convincing evidence. The jury did not find either

falsity or publication by clear and convincing evidence. On the other interrogatory the jury found that falsity and publication had been established by at least a preponderance of the evidence. Id. at ¶44-46

This case shows that a jury can find constitutional malice by clear and convincing evidence while finding falsity not by clear and convincing but only by a preponderance of the evidence.

HARM

More harm will be done the longer this question goes unanswered. It has been 15 years since this Court decided it's last defamation case. *Masson v. New Yorker Magazine*, 501 U.S. 496 , 111 S. Ct. 2419 (U.S. June 20, 1991) (VersusLaw) How much harm will be done before this Court has its next opportunity to decide the standard of proof of falsity question? Texas and the nine states of the Ninth Federal Circuit have the preponderance of evidence standard as the rule. Political speech of the people who live in these 10 states will receive less First Amendment protection than similar political speech would receive in most other parts of the country. The lack of clarity, what standard of proof is, leaves citizens and the media wondering what protection they have.

The likelihood of a judgment in excess of one million dollars after all the appeals produces self censorship which limits the public debate on political issues. The damages in this case after nine years in the appeals process are $1.3 million. Media Law Resource Center's *Annual Study of Media Trials 2005*,reports that after appeals average damage award was-$1.4 million.

These kinds of damages make people reluctant to get involved and encourage anonymous participants. If this question goes undecided, it harms not only this case but the people of this nation. The harm will be to the speakers, writers and listeners. Citizens nor the media can not be confident about the legal consequences of their actions. This void in the rule of

law has a chilling effect on individuals and the media which effects the public debate

TECHNOLOGY'S IMPACT

Advances in technology has created a compelling reason why this court should answer this question now. There was not an Internet in 1989 when this Court decided *Harte-Hanks Communications v. Connaughton*. There was probably less than a hundred media organizations whose publication reached all 50 states.

Today millions of citizens from their homes can produce message boards, web pages, blogs and webcasts that are accessible in all 50 state. Technology has not provided the ability to filter access from jurisdictions whose rule of law is unclear or unknown or less favorable to free speech. Because of the confusion in the law and the lack of technical ability to limit access the only option to limit liability is to limit content. Twenty years ago there were a few hundred potential defendants impacted by the law in all jurisdictions. Now there are millions of potential defendants who should be concerned about what the rule of law is in all jurisdictions.

For those who are considering using this new technology to exercise their freedom of speech surfing the web maybe an eye opening experience . The results of their search may have a chilling effect on their plans, when they find the following kinds of information:

COST OF TRUTH

Bloggers' FAQ - Online Defamation Law

> Is truth a defense to defamation claims?
>
> Yes. Truth is an absolute defense to a defamation claim. But keep in mind that the **truth may be difficult and expensive to prove**.

INSURANCE IS NEEDED

Online Publishing Risks Create Need for Libel Insurance

For most online publishers, insuring against libel and other publishing liabilities is a lot like insuring your house against a fire. The odds you'll ever need to use the policy are low, but the consequences of not having it when you need it can be catastrophic.

Typically, the minimum limit for a media policy is $1 million. For larger publishers, coverage up to $100 million can readily be placed. Premiums for media policies can start as low as $1,500. Deductibles generally start at $5,000 for a $1 million policy.

Bloggers' FAQ - Online Defamation Law

Can I get insurance to cover defamation claims? Yes. Many insurance companies are now offering media liability insurance policies designed to cover online libel claims. However, the costs could be steep for small blogs — The minimum annual premium is generally $2,500 for a $1 million limit, with a minimum deductible of $5,000. In addition, the insurer will conduct a review of the publisher, and may insist upon certain standards and qualifications (i.e. procedures to screen inflammatory/offensive content, procedures to "take down" content after complaint).

RIPE FOR RESOLUTION

This case is ripe for this Court on this one question. The question has not been resolved. This case is within the jurisdiction of this court on a timely filed petition after a final judgment from the highest court in the state. Supreme Court Rule 10, list three sets of characteristics of the types of cases

that this Court considers granting a Writ of Certiorari. All three of these characteristics apply to this case, conflict between Federal Circuit courts about the question before this court; the Second Federal Circuit Court's decisions conflict with The Supreme Court of Texas' decision in this case; and this Court has never decided this question.

COMPELLING REASONS

Compelling reasons to grant this petition and decide this question are to:

- Resolve the inconsistent legal standards that lead to self censorship;
- To ensure that political speech in Texas does not receive less First Amendment protection than similar political speech would receive in most other parts of the country;
- resolve the conflict in the Federal Circuit and state courts now;
- make defamation law less confusing for judges and juries;
- give people confidence about the legal consequences of their actions; and
- provide more liberty in the public debate.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing on the single question: Whether a public official plaintiff has the burden to prove falsity by a preponderance of the evidence or clear and convincing evidence?.

The court should grant petition for writ of certiorari on this question and after Briefs on the Merits and without oral arguments find that: The First Amendment to the United States Constitution requires that before a public official or figure may recover for defamation clear and convincing evidence must be established that the statement at issue was false. That the judgment of The Supreme Court of Texas is reversed, and the cases be remanded for a new trial.

March 31, 2006

Respectfully submitted,

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